U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 September 2006

BALCA Case No.: 2005-INA-00167
ETA Case No.: 2002-CA-09538040/JS

In the Matter of:

LEISURE COURT NURSING CENTER,
Employer,

on behalf of

MARILYN GASCAL UY,
Alien.

Appearances: William B. Bennett, Esquire
Fountain Valley, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: **Burke, Chapman, and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer (CO) of alien labor certification for the position of Resident Care Aide.[1] The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

[1] Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations (C.F.R.). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted. We base our decision on

STATEMENT OF THE CASE

On April 4, 2001, Employer, Leisure Court Nursing Center, filed an application for labor certification to enable the Alien, Marilyn Gascal Uy, to fill the position of Resident Care Aide. (AF 35). The position required three months of experience in the job offered or three months in the related occupation of Staff Nurse.

On December 3, 2002, Employer submitted its recruitment results. (AF 40). Employer indicated that Applicant #1 was sent a letter by certified mail on November 8, 2002. She was telephoned on November 8, 2002, at which time there was no answer. Later that day, a second telephone call was made and a message left with the individual who answered. The applicant was telephoned a third time the next day and there was no answer. The applicant never responded to the telephone calls or certified mailing, and a review of her resume revealed that she would be unable to perform the job duties because she did not have experience in observing and documenting resident behaviors. While she had the basic skills to perform the job, she lacked the extensive skills needed to assist clients in their development. Applicant #2 was telephoned and a telephone interview was held. At that time, it was determined that the applicant would be unable to perform the job duties because she did not have experience in observing and documenting resident behaviors, and while she had the basic skills to perform in a residential care facility, she lacked the extensive skills needed to assist clients in their development. Therefore, she was disqualified because she did not meet the minimum requirements.

On September 9, 2004, the CO issued a Notice of Findings, (NOF) proposing to deny certification on the basis of the rejection of U.S. workers for other than lawful, job-related reasons. (AF 31). The CO found Applicant #1 to be qualified and that Employer failed to show a good faith effort to recruit her, as the certified mail return receipt indicated that the applicant

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the record upon which the CO denied certification and Employer's request for review, as contained in the appeal file ("AF") and any written arguments. 20 C.F.R. §656.27(c).

received her letter on December 4, 2002, and Employer failed to provide the certified mail receipt establishing when the letter was actually mailed.[1] Even assuming that letter was mailed on November 8th (the date affixed to the letter), the CO found it did not appear to have been timely, given that there were only two applicants for the position, and therefore, there was no basis for waiting two weeks prior to attempting contact. In this respect, the CO also found that the attempts to contact the applicant by telephone were not timely, and Employer's account of the one message left did not indicate whether the advertised position was specifically identified or whether the recipient actually delivered the message to the applicant. The CO also rejected Employer's assertion that the applicant lacked the skills to perform in a residential care facility.

With regard to Applicant #2, the CO noted that she was rejected as not qualified after a telephone interview on November 13, 2002, after Employer determined that the applicant lacked experience in observing and documenting resident behaviors, such as speech production and feeding problems. The CO disagreed, noting that the job only required three months of experience and the applicant's resume showed one year and seven months of experience as a nurse aid with developmentally disabled adults. Employer was directed to submit rebuttal that showed how the U.S. applicants were recruited in good faith and rejected solely for lawful, job-related reasons.

Counsel for Employer submitted rebuttal on October 13, 2004. (AF 25). Counsel indicated that Applicant #1 did not respond to four attempts to contact her and was disqualified for not being available to perform the job duties. Applicant #2 was rejected because she did not show up for an interview. Included with rebuttal was a letter dated September 30, 2004, from Employer's administrator. (AF 27). The administrator stated that the administrator conducted the interviews of the applicants. Applicant #1 was contacted by mail after three attempts to reach her by telephone, a fourth attempt having revealed that her telephone had been disconnected. According to Employer, the position was specifically offered to this applicant, but because the telephone was disconnected, Employer could not verify that the individual with whom the message had been left had delivered it. With regard to Applicant #2, Employer stated

[1] The Appeal File contains no explanation for why the recruitment report is dated one day before the return receipt.

that she seemed qualified for the job duties and seemed interested on the telephone, however, she did not show up for the actual in-person interview.

A Final Determination was issued on November 10, 2004. (AF 20). The CO found that Employer's rebuttal was inconsistent with its initial report of recruitment. In its recruitment report, Employer had indicated that Applicant #2 lacked the ability to perform the job. The recruitment report made no mention of any scheduled in-person interview or evidence that the applicant missed the interview. As that report indicated that she had been disqualified after a telephone interview, the CO did not find it credible that she missed a subsequent in-person interview. The CO also found that Employer failed to document any timely attempted contact with Applicant #1, further noting that when Employer's letter was not received, leaving a message was not enough.

Employer filed a Request for Reconsideration/Alternative Request for Review By the Chief Administrative Law Judge, BALCA, on December 9, 2004. The CO denied the request for reconsideration on March 28, 2005. (AF 19). This matter was then forwarded to the Board of Alien Labor Certification Appeals (Board). The Board docketed the case on June 14, 2005. Employer filed a brief on appeal dated July 1, 2005.

DISCUSSION

In its Request for Review, and with regard to Applicant #1, Employer maintained that both her unavailability and the later confirmation of her inability to perform the job duties were sufficient to reject her. According to Employer, "when ultimately responding to our many requests, it was determined that she would be unable to perform the position." With regard to Applicant #2, Employer argued that it is not inconsistent to state that the applicant was initially deemed unable to perform the job after a telephone interview and subsequently found unavailable when she failed to appear for a scheduled in-person interview. Employer also argued that the prior inconsistent statement by Employer with regard to Applicant #2 is not admissible because the statement was not made under oath pursuant to the Federal Rules of Evidence. Employer argued further that its rebuttal to the NOF consisted of a consistent

statement to show that Applicant #2 was interviewed on the phone and an in-person interview was scheduled but the applicant did not show for the interview. Employer asserted that it contacted the applicants in a timely manner and in good faith and that it can lawfully reject an applicant whose specific experience does not meet its business needs.

On appeal, Employer reiterates many of its arguments presented in its Request for Review, insisting that "employer specifically met and addressed the issue and instructions from the NOF," and "[g]iven the limited option of providing lawful job related reasons by the NOF, it is only reasonable to accept that response under such circumstances without providing alternative remedies." In addition, Employer restates on appeal its position regarding its previous inconsistent statements. Finally, Employer claims that it rejected the applicants for lawful, job-related reasons after contacting them in a timely manner and in good faith.

An employer who seeks to hire an alien for a job opening must demonstrate that it has first made a good faith effort to fill the position with a U.S. worker. *H.C. LaMarche Ent., Inc.*, 1987-INA-607 (Oct. 27, 1988). Actions which indicate a lack of good faith recruitment are grounds for denial. 20 C.F.R. §§ 656.1, 656.2(b). It is the employer who has the burden of production and persuasion on the issue of the lawful rejection of U.S. workers. *Cathay Carpet Mill, Inc.,* 1987-INA-161 (Dec. 7, 1988)(*en banc*). Labor certification is properly denied where the employer rejects a U.S. worker who meets the stated minimum requirements for the job. *Exxon Chemical Company*, 1987-INA-615 (July 18, 1988) (*en banc*).

It is clear that both of the U.S. applicants met the stated requirements of the job. Employer has provided inconsistent reasons for the rejection of these applicants, thus raising issues regarding the credibility of its statements. It has also failed to establish timely contact with Applicant #1, which was a central concern raised by the CO. Although the contact letter was dated November 8, 2002, it was not received until December 4, 2002. Moreover, that letter indicated that the applicant needed to respond within ten days from receipt of the letter, and if not the applicant would be considered not interested in the position. As the applicant received the letter nearly a month after it had been mailed, that she might not find it worthwhile to respond is not surprising. Additionally, we observe that the signature on the return receipt does

not even appear to be that of the Applicant. (AF 42). This Board has held that leaving a message with an applicant's spouse does not relieve the employer of its burden to attempt to contact the applicant directly. *Dove Homes, Inc.*, 1987-INA-680 (May 25, 1988) (*en banc*). Here, Employer left a message with an individual whose relationship with the applicant is not even known, if indeed there is one. The only other proof of attempts to contact are a letter dated November 8, 2002 and received December 4, 2002, with no proof of when it was mailed.

Not only are Employer's efforts less than indicative of good faith, its documentation of good faith and valid reasons for the rejection of these applicants is less than credible. Although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. Where a fact lends itself to proof by independent documentation, the weight and sufficiency of a party's case is bolstered by such documentation.

As noted, the credibility of Employer's recruitment report and rebuttal are at issue. The CO questioned why the proof of mailing the certified letter to Applicant #1 was not provided. Employer did not respond to that finding when it provided rebuttal. Compliance with the reasonable request to provide documentation of good faith efforts to contact the U .S. applicant would have greatly bolstered Employer's case. That request was clearly made in the NOF, but then ignored by Employer. The only documentation before this Board is Employer's conflicting statements as to why the U.S. applicants were rejected. Employer has failed to meet its burden of establishing a good faith recruitment effort. Thus, labor certification was properly denied, and the following order shall issue.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.